Supreme Court of the United States

OCTOBER TERM, 1940.

No. 524.

DEN NORSKE AMERIKALINJE A/S, as claimant of the steamship "IDEFJORD", her engines, etc.,

Petitioner,

—against—

BLUMENTHAL IMPORT CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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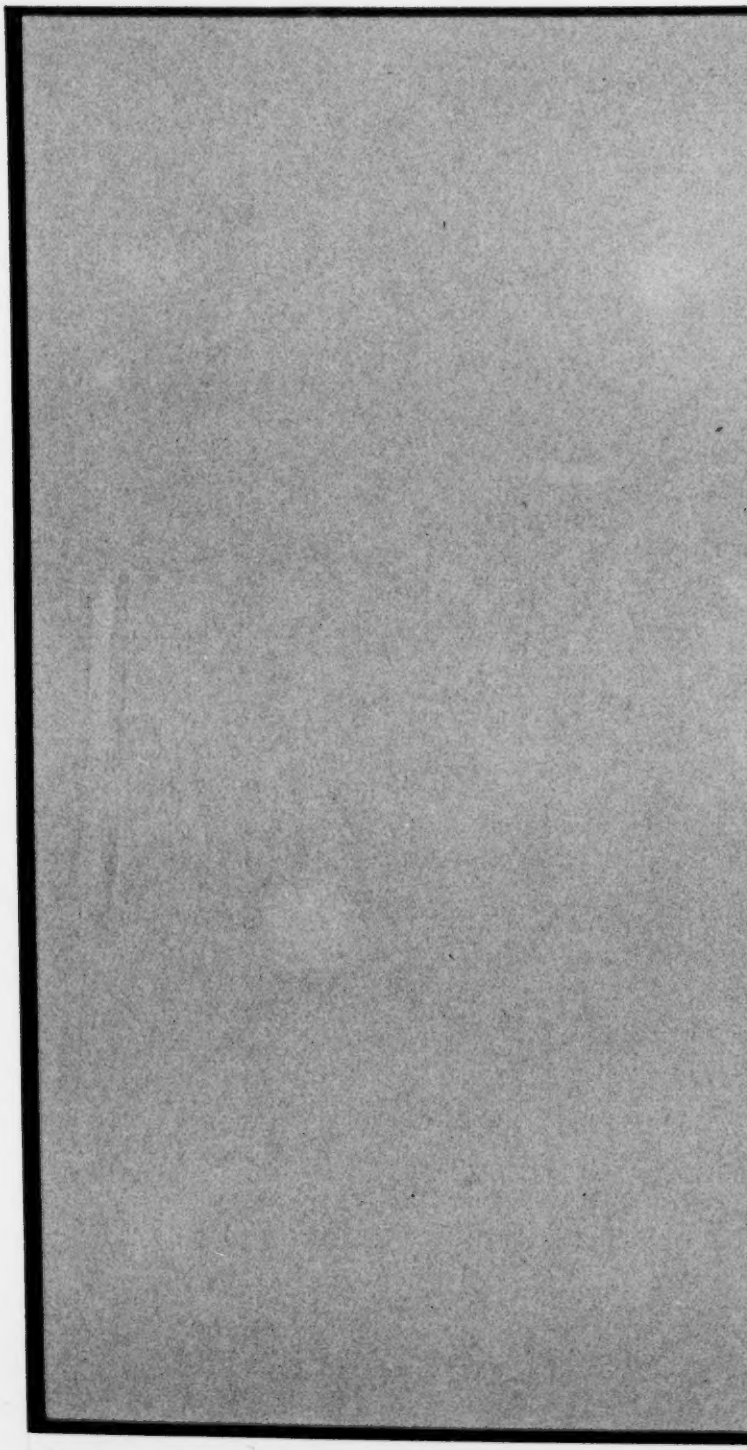

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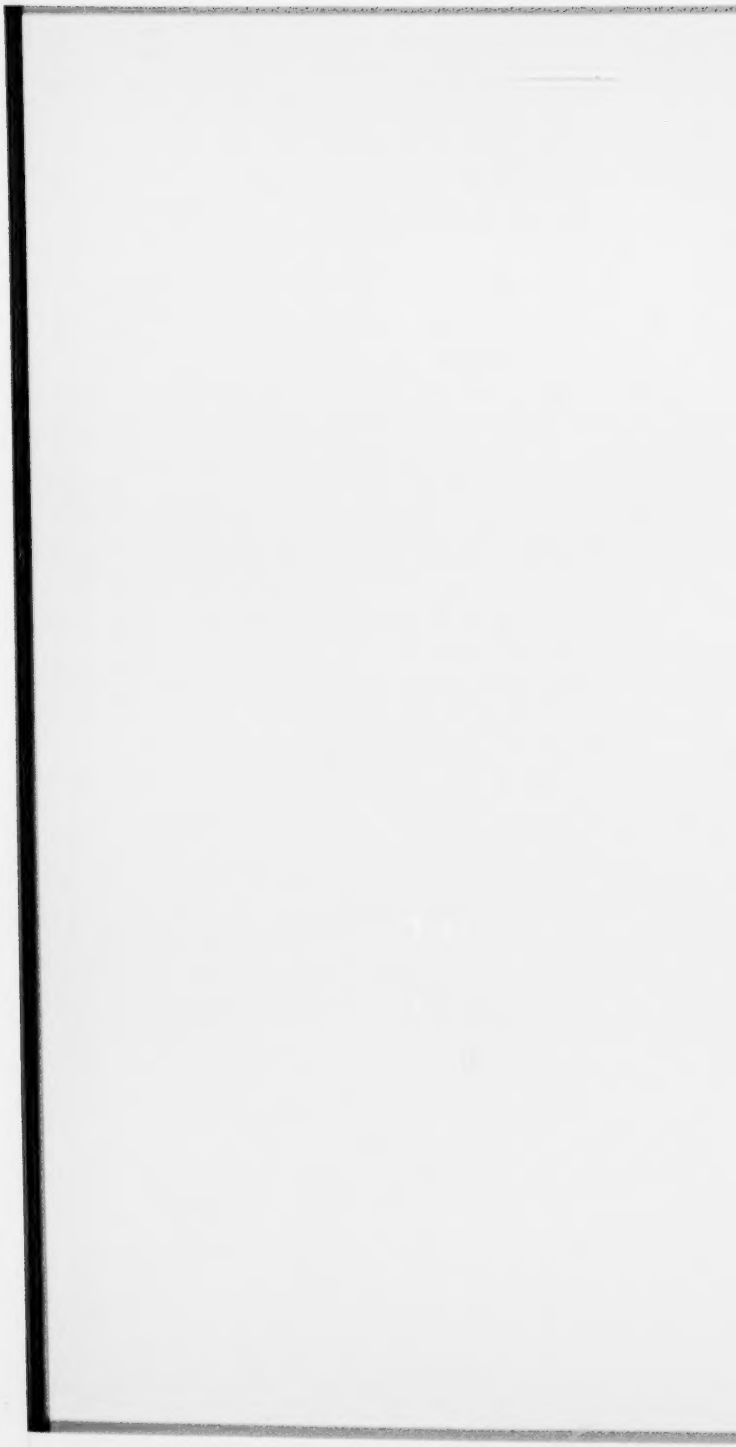

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I.

The Opinions Below.

The opinion of the District Court (R., pp. 282-293) was filed on December 22, 1939, and is reported in 31 F. Supp. 667.

The opinion of the Circuit Court of Appeals for the Second Circuit was filed on August 9, 1940 (R., pp. 305-312) and is reported in 114 F. (2d) 262.

II.

Statement of Case.

The petition contains many misstatements and omissions, some of which must be corrected in order to present a fair statement of the case.

In paragraph 2, on page 2, the statement that all the District Court's findings of fact were accepted by the Circuit Court of Appeals is untrue. The Circuit Court made their own findings except (R., p. 307) that they saw no reason to disturb the District Court's finding that the damage was due solely to the on-deck carriage and they accepted the lower court's conclusion that the "Idefjord" and her crew were otherwise free from negligence.

In paragraph 4, page 2, the misleading statement is made that Pitellos & Co. issued five "so-called" bills of lading. While counsel for the shipowners may characterize these bills of lading as "so-called", the documents themselves were given full weight and accorded full dignity by the Circuit Court of Appeals, which found that (R., p. 306):

> "Pitellos & Co. issued five similar negotiable bills of lading stating that varying numbers of bales of wool had been shipped in apparent good order at Alexandria for delivery in New York and Philadelphia to libellant's bankers or their assigns as consignees."

It was stipulated at the trial (R., p. 10) that these negotiable bills of lading (which petitioner disparages) covered the shipments of wool involved in this litigation; that they were presented at destination (New York) to the "Idefjord's" agents (Phelps Bros. & Co.) and that customs entries were made on the basis of these bills of lading. These are also the bills of lading which were negotiated through the banks (R., pp. 39-49).

Paragraph 5, page 2 (which according to paragraph 2 contains a fact found by both Courts below), states that after the wool had moved from Alexandria to Port Said, no under-deck space was available on any steamer for

several months. No such finding of fact was made by the District Court or by the Circuit Court of Appeals.

In paragraph 7 (which according to paragraph 2 contains a fact found by both Courts below) the statement is made that the contract under which the "Idefjord" received the bills of lading was evidenced by letters of Stapledon & Sons and Port Said & Suez Coal Co., the ship's manifest, the mate's receipts and the bills of lading. Not only was this not a fact found by the Circuit Court of Appeals, but it is squarely contradicted by the decision of that Court.

The facts are fully and fairly stated in the opinion of the Circuit Court of Appeals to which respondent respectfully refers.

III.

The Question Presented.

It is respectfully submitted that the question presented is not whether *The St. Hubert* was correctly decided, but whether a contract for on-deck carriage at shippers' risk of a valuable cargo susceptible to water damage, such as wool, was a reasonable one where negotiable bills of lading were outstanding calling for carriage in the usual manner, namely in the cargo compartments of the vessel below deck.

IV.

Reasons for Denying the Petition.

There is no conflict between the decision of the Circuit Court of Appeals for this Circuit and the decision of the Circuit Court of Appeals for the Third Circuit in *The*

St. Hubert, 107 Fed. 727, as respondent shall hereinafter show.

There is no important question of commercial law involved in this appeal. This petition is simply an attempt to persuade this Court to reverse its own holdings in cases which have been accepted for years by the commercial community as stating the settled law.

In *The Delaware*, 14 Wall. 579, and more than 50 years later in *St. Johns N. F. Shipping Corp.* v. *S. A. Companhia Geral Commercial*, 263 U. S. 119, this Court held that a carrier cannot carry on deck goods shipped under a clean bill of lading. There is no reason why this unequivocal and well known rule of long standing should be violated in favor of an on-carrying vessel at a transshipment port whose captain received and had on board copies of the outstanding negotiable clean bills of lading calling for delivery to the order of a third party who did not consent to the on-deck carriage.

Argument.

FIRST POINT.

There is no conflict between the decision in *St. Hubert* and the decision in this case.

What *The St. Hubert* decided, and all it decided, was that a consignee in a transshipment case is bound by the usual bill of lading clause requiring notice of claim for damage to be presented before merchandise is removed from the pier. In that case it does not appear whether the through bills of lading were negotiable, and moreover a second bill of lading was actually issued and delivered by the on-carrier.

In the instant case, the Circuit Court of Appeals held that the Alexandria through bills of lading were negotiable and upon their presentation, with drafts, to the London banks would be honored by the latter; that this was not an unusual or unreasonable course of business; that the "Idefjord" having notice of the circumstances and terms of these bills of lading knew that commercial drafts were being or might be honored in reliance on the normal conditions of carriage, set forth therein; that the "Idefjord" therefore was not free to arrange carriage of the cargo in substantial disregard of the original agreement; that the authority of Stapledon & Sons was unknown to the "Idefjord" and is still unknown to the courts who have passed on this litigation; that even if Stapledon & Sons were authorized by the shipper to contract for on-deck carriage, the "Idefjord" was on notice from the terms of the negotiable bills of lading that the shipper was not the consignee and, therefore, might not and probably did not possess valid authority to bind whoever might be the holder of the negotiable through bills of lading; and that unless a duty on the part of the on-carrying steamer to comply with the through bills of lading be recognized, no protection can be afforded to banks and merchants who are accustomed to rely upon such arrangements for financing imports.

The St. Hubert, Crossan v. *New York & N. E. R. Co.*, 149 Mass. 196, and other cases relied on by petitioner, were considered, discussed and clearly distinguished by the Circuit Court of Appeals (R., pp. 309, 311, 312) which stated (R., p. 312):

> "The variations in the decisions above cited were either of the sort ordinarily to be expected in different bills of lading or eminently reasonable under the situation confronting the on-carrying conveyance."

LAST POINT.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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